

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GREGORY RICHARD VICK,

Defendant-Appellant.

UNPUBLISHED

July 27, 1999

No. 209343

Kent Circuit Court

LC No. 96-012855 FH

Before: Sawyer, P.J., and Holbrook, Jr., and W. E. Collette,* JJ.

PER CURIAM.

Defendant appeals by right from the judgment of sentence of three to ten years' imprisonment entered on his jury trial conviction of possession with intent to deliver marijuana, MCL 333.7401(2)(d)(iii); MSA 14.15(7401)(2)(d)(iii), with sentencing enhancement as an habitual offender, fourth offense, MCL 769.12(1)(b); MSA 28.1084(1)(b). We affirm defendant's underlying controlled substance offense conviction but reverse his conviction as a fourth habitual offender and remand for resentencing as a third habitual offender, MCL 769.11(1)(a); MSA 28.1083(1)(a). This appeal is being decided without oral argument pursuant to MCR 7.214(E).

On appeal, defendant does not challenge his underlying controlled substance offense conviction, but challenges only the enhancement of his sentence as an habitual offender. Specifically, defendant contends that the prosecution failed to give notice of its intent to seek habitual offender sentence enhancement in accordance with subsections (1) and (2) of MCL 769.13; MSA 28.1085, and that the trial court failed to determine the existence of his prior convictions as required by subsection (5) of the statute.

Defendant's notice argument overlooks the fact that written notice of the prosecution's intent to seek an enhancement of defendant's sentence as a fourth offense habitual offender, specifically listing the prior felonies in question, was provided in the information filed on the underlying controlled substance charge in circuit court. Moreover, proof that defendant was timely served this habitual offender notification is contained in the record, i.e., the waiver of circuit court arraignment form, signed by

* Circuit judge, sitting on the Court of Appeals by assignment.

defendant and his attorney, acknowledging that defendant received a copy of the information. Any defects in the prosecution's compliance with the procedural requirements of MCL 769.13; MSA 28.1085 do not warrant reversal in the absence of unjust prejudice to defendant. MCR 2.613(A); MCL 769.26; MSA 28.1096; *People v Mateo*, 453 Mich 203, 212-215; 551 NW2d 891 (1996). Here, there was no unjust prejudice to defendant, since the information provided timely notification that sentencing would include special consideration of the prior convictions. *People v Martin*, 209 Mich App 362, 364; 531 NW2d 755 (1995), lv den 451 Mich 882 (1996).

As for defendant's argument that the trial court failed to determine the existence of his prior convictions, we reject defendant's argument in part, with respect to the two prior convictions listed in the habitual offender notification in the information that were also detailed in the unchallenged presentence investigation report. The listing of those offenses in the presentence report, and the sentencing judge's specific reference to defendant's prior felony convictions and his habitual offender status, suffice to satisfy the requirements of MCL 769.13(5); MSA 28.1085(5). *People v Green*, 228 Mich App 684, 700; 580 NW2d 444 (1998), lv den 459 Mich 930 (1998).

However, because the presentence report did not list the June 1, 1988, prison escape conviction listed in the habitual offender notification, nor was the existence of that conviction otherwise indicated in accordance with MCL 769.13(5); MSA 28.1085(5), only two of the prior convictions alleged in the notification were determined, and defendant was therefore only subject to sentence enhancement as a third habitual offender, pursuant to MCL 769.11(1)(a); MSA 28.1083(1)(a). Accordingly, this matter must be remanded for resentencing on this ground.

We affirm defendant's conviction of the underlying controlled substance offense but reverse his conviction as a fourth habitual offender and remand for resentencing as a third habitual offender. We do not retain jurisdiction.

/s/ David H. Sawyer

/s/ Donald E. Holbrook, Jr.

/s/ William E. Collette